No. 80-337

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PETER M. ROBERTS,

Petitioner,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTRODUCTION

Plaintiff's latest Petition for a Writ of Certiorari (herein "petition") is merely another in his seemingly endless efforts to have the courts add to a $1,000,000 jury verdict in his favor, a verdict which was paid in full in accordance with petitioner's demand. Although petitioner now speaks of purported "Constitutional violations" and "conflicts" created by the Seventh Circuit's most recent opinion, his arguments still amount to no more than a claim that a jury instruction which he himself tendered, and from which he did not appeal, was improper. He

also claims that the jury verdict should be judicially increased because he is not satisfied with its amount. But, as respondent will show, these very contentions have previously and properly been rejected by two panels of the Seventh Circuit, by that court *in banc* and by this Court as well.[1] Respondent respectfully submits that petitioner's position is no more tenable now than it was when it was previously rejected. His petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner states that in order to properly evaluate his claims, "it is necessary" that this Court have the full factual history of this litigation (App. 2). However, in truth, petitioner has ignored most of the actual facts. Accordingly, the following brief counterstatement of facts is submitted.

Petitioner would have this Court believe that the trial jury did not award and that he never had an opportunity to receive respondent's profits. But this Court should be aware that petitioner, pursuant to his demand, has already received a jury award of respondent's profits. What he seeks now is another "bite at the same apple" simply because he is not happy with the size of the $1,000,000 verdict.

The trial court gave an instruction dealing with monetary recovery which petitioner had tendered (App. 62a-63a). Based upon that instruction, petitioner then argued to the jury that it should award him respondent's profits:

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[1] This court denied petitioner's "conditional" Petition For Certiorari. 439 U.S. 860 (1978).

[2] The abbreviations used in this Response have the following meanings: "App." refers to the Appendix filed by petitioner along with this petition, "SA" refers to the Appendix filed by the parties on the second appeal to the Seventh Circuit, and "T" refers to the trial transcript.

> Mr. L. Davidson [Petitioner's counsel]: Now about this other figure, *out of those incremental profits I must leave this to the jury entirely, ladies and gentlemen. I know we are talking about a tremendous sum of money. We are talking about $44 million...*
>
> Here is where we all stand on an equal plane and *the law gives you the right, if you think it is the appropriate thing in this case because of the fraud they committed, to take away the profits that Sears obtained, up to the amount that they acquired...*
>
> As far as the amount, ladies and gentlemen, that is your function and not mine. I can only explain what his rights are under the law. I'm not going to urge it either way because I feel that is something the jury should decide, use their own sense of fairness as to what is right...
>
> The jury would be properly entitled here, ladies and gentlemen, to award to Roberts *all of the so-called incremental profits or some fair portion of them...* (T3366, 3367, 3438, 3449; emphasis added.)

After evaluating the conflicting evidence on liability and monetary relief, the jury returned a verdict for petitioner in the amount of $1,000,000. Petitioner then filed a post-trial motion which disavowed any request for judgment NOV or a new trial. Instead, he asked for "complimentary relief in aid of the verdicts", specifically a $43,000,000 increase in the jury award and for respondent to return his patents. App. 65a-68a. The trial court denied this post-trial motion, holding that the $1,000,000 jury award was reasonable (SA. 149, 219-225).

Petitioner appealed to the Seventh Circuit, seeking once again an increase in the jury award, return of the patents and also an award of profits for the period following the jury verdict. In that first appeal, petitioner contended that his instruction on monetary recovery required an award of respondent's *profits, not damages.* Thus, his brief to the Seventh Circuit stated:

> *. . .the measure of recovery in this instruction was the profits and benefits Sears derived from the use of Roberts' invention.* (fn. 10, SA261, emphasis added.)
>
> * * * * * * *
>
> *To be sure, the trial court here used the term "damages" . . .*, but *as the court's own remarks during the instruction conference clearly show, the court was speaking of such "damages" as he would consider as a chancellor sitting in equity.* Thus, the court said that he could determine whether the contract should be rescinded, whether there should be an accounting, or whether to award damages, the measure of damage being "the benefit or net profit *the defendant had in order, as the Courts often say, to compel a disgorging from the Defendant of the benefits and profits he derives or it derived as a result of the wrong about which complaint is made." The word "damages," therefore, was used in the context of the amount of monetary restitution necessary to deprive Sears of enrichment unjustly obtained.* (SA249-250, emphasis added in part, footnote omitted.)

And, indeed, the Seventh Circuit *agreed* with petitioner that the jury had awarded respondent's profits. It also ruled that petitioner was bound by the jury verdict and that it could not be increased, as petitioner asserted, because to do so "would have been *completely unfair* to Sears".[3] Thus, the Seventh Circuit's opinion and mandate held:

> . . . Apparently dissatisfied with the size of the jury verdict, plaintiff sought in a post-trial motion to have the court reconsider the evidence and award relief based on essentially the same standard the jury used. *To have granted plaintiff's request would have been completely unfair to Sears.* It might have been better for the court to require the plaintiff to elect his remedy expressly prior to instructing the jury, but plaintiff did not object to the court's procedure, and therefore, must have been satisfied to let the jury determine the appropriate award. Having let the

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[3] As respondent argued to the Seventh Circuit and this Court, such an increase would have also been an unconstitutional additur.

> case go to the jury without getting the issue clarified, plaintiff should not be heard to complain about the outcome of that procedure. *Roberts* v. *Sears, Roebuck and Co.*, 573 F.2d 976, 985 (7th Cir. 1978), App. 1a, 16a. (Emphasis added.)

The Seventh Circuit also rejected petitioner's request for post-judgment profits. However, it remanded the cause to the trial court, directing it to determine whether the patents should be returned to petitioner, thereby permitting him to receive whatever benefits they might engender during the post-judgment period:

> With regard to an election between the profits awarded by the jury and *return of the patent* based on rescission, however, we see no basis for invoking the election of remedies doctrine. Based on the jury instruction, plaintiff will receive one million dollars as the measure of *past profits* earned by Sears up to the time of trial. That award, however, is not inconsistent with *return of the patent* so that plaintiff can receive the *future benefits of the patent* that Sears fraudulently acquired. There will be neither a double recovery nor a factual inconsistency between these remedies. Therefore, we conclude that going to the jury under a *past profits instruction* did not bar plaintiff from seeking rescission and *thereby possibly recovering his patent.* Whether rescission is appropriate, however, is an issue that should be decided in the first instance by the district court. 573 F.2d at 985-986, App. 16a-17a. (Emphasis added in part, citations omitted.)

Plaintiff did not petition the Seventh Circuit for rehearing following the first appeal, although he later argued that its first opinion and mandate were a "mistake" (SA. 926, 927, 935, 939). As his attorneys stated: *"we felt that for a variety of reasons, we weren't going to get anywhere with a motion for rehearing"* (SA837, emphasis added). Plaintiff did petition this Court for review, claiming that the Seventh Circuit had erred in

refusing him all of the relief which he desired. The petition was denied.[4]

Despite the law of the case, petitioner then argued on remand that the trial court could simply ignore the mandate of the Seventh Circuit and award him the very relief the courts had just refused him. Indeed, he even went so far as to call the Seventh Circuit's mandate a "mistake", a "misunderstanding" and "bizarre" (SA. 926, 927, 935, 939).

Evidently the tactic was persuasive, for petitioner convinced the trial court to ignore the Seventh Circuit's mandate. In addition to ordering respondent to reconvey the patents, the trial court's decree on remand required respondent to account for its profits *both* before and after the verdict and held that petitioner was entitled to this accounting in *addition* to the $1,000,000 jury award. *Roberts* v. *Sears, Roebuck and Co.*, 471 F.Supp. 372 (N.D. Ill. 1979), App. 18a.

Respondent appealed to the Seventh Circuit. On this second appeal, the Court of Appeals held that the trial court's decree improperly violated its mandate. *Roberts* v. *Sears, Roebuck and Co.*, 617 F.2d 460 (7th Cir. 1980), App. 36a. The Seventh Circuit therefore reversed the decree on remand "as being contrary to our earlier opinion and mandate" (617 F.2d at 465, App.44a.), noting that it apparently resulted from ". . . a basic misunderstanding upon remand of the mandate conveyed by the prior appeal". (617 F.2d at 640, App. 36a).

Thus enforcing the law of the case as set forth in its prior mandate, the Court of Appeals unanimously stated that petitioner would be the owner of the patents as of January 20, 1977, the date when judgment had been entered on the jury verdict, and that petitioner was entitled to nothing more for the

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[4] Respondent also filed a petition for certiorari at that time, and petitioner denominated his petition "conditional". However, this Court denied each petition in separate orders. 439 U.S. 860 (1978).

pre-judgment period. The court also ruled that petitioner was not entitled to an accounting of respondent's profits after the effective date of petitioner's ownership of the patents and that his relief for that period must be limited to any benefits which ownership of the patents would provide.

Although it is not mentioned anywhere in the pending petition, petitioner unsuccessfully sought rehearing of the Seventh Circuit's second opinion, and also a rehearing *in banc.* (App. 49a) That petition, like this one, simply recounted arguments previously rejected by that court and this one. Respondent submits that the time has come to put an end to petitioner's repeated attempts to improve on the $1,000,000 jury verdict on the sole ground that it did not meet his monetary expectations. Clearly, that is not a sufficient basis for certiorari and respondent respectfully urges that the petition be denied.

ARGUMENT

A.

Petitioner Has Not Been Deprived Of Any Right Guaranteed By The Seventh Amendment To The United States Constitution.

Petitioner's claim that the Seventh Circuit denied him the right to a jury trial is simply incredible. As respondent has pointed out, petitioner demanded and received a jury trial. *All* of his claims were submitted to the jury. On the basis of an instruction he tendered, he specifically argued to the jury that it should award him respondent's profits. The jury returned a verdict awarding petitioner $1,000,000, and the judgment on that verdict was fully satisfied by respondent. Petitioner, who demanded and received payment of the judgment, never sought to overturn the verdict or to have the case retried.

The real sum and substance of petitioner's purported Seventh Amendment claim, then, is not that he has been denied a jury trial but, rather, that he has been denied an award in an amount he deems acceptable and that he wants the award increased. But, respondent knows of no authority which extends the right to a trial by jury to include the right to monetary recovery in an amount specified by the plaintiff. Petitioner has clearly received that which the Seventh Amendment guarantees—a resolution by a jury of contested issues of fact. The Constitution requires no more.

Indeed, respondent submits that the Constitution forbids the relief which petitioner demands. Any judicial increase in the amount awarded by the jury would deny respondent its right to a jury trial. Such an additur, or substitution of a court's judgment for that of the jury, has been long and uniformly held unconstitutional.[5] *Dimick* v. *Schiedt,* 293 U.S. 474 (1935);

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[5] Respondent submits there can be no clearer proof that this is really what petitioner is seeking than his offer to give respondent a "credit" of the $1,000,000 already paid and received. Obviously, if petitioner would give respondent such a "credit", it must mean he has already recovered the profits he now seeks.

DePinto v. *Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied sub. nom. Gorsuch* v. *DePinto*, 376 U.S. 950 (1964) *United Airlines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964); *United States* v. *93.970 Acres of Land*, 258 F.2d 17 (7th Cir. 1958), *rev'd on other grds.*, 360 U.S. 328 (1959); *Milprint, Inc.* v. *Donaldson Chocolate Co.*, 222 F.2d 898 (8th Cir. 1955); *Southern Farm Bureau Casualty Insurance Co.* v. *Palmer*, 263 F.2d 206 (5th Cir. 1959); *New Orleans & Northeastern R.R. Co.* v. *Hewett Oil Co.*, 341 F.2d 406 (5th Cir. 1965); *Silverman* v. *Travelers Insurance Co.*, 277 F.2d 257 (5th Cir. 1960). Clearly, then, the Constitution and the law interpreting it prohibit petitioner from receiving a judicial increase in his jury award.

Petitioner also persists in claiming that the jury was erroneously charged concerning monetary recovery. In the first place, as noted above, petitioner tendered the very instruction of which he now complains. Obviously, he has failed to meet the stringent requirements of F.R.C.P. 51[6] concerning objections to instructions. Moreover, petitioner expressly declined to ask the trial court for a new trial in his post-trial motion or to raise the issue in the first appeal. He has thus, in any event, failed to preserve any claim that the verdict was inadequate. *Panger* v. *Duluth, W. & P.R. Co.*, 490 F.2d 1112 (8th Cir. 1974); *Ryen* v. *Owens*, 446 F.2d 1333 (D.C. Cir. 1971); *Baker* v. *Dillon*, 389 F.2d 57 (5th Cir. 1968); 6A Moore, *Federal Practice*, ¶ 59.14 at p. 59-265 (1979).

But even if respondent had properly preserved a claim of error with respect to the instruction, any such claim would be groundless in substance. Although he now claims that the instruction directed the jury to return an award of "damages",

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[6] ". . .No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of the objection. . . ."

not profits, petitioner argued to the jury that, under the instruction, it should give him respondent's profits. (T. 3366, 3367, 3438, 3449). Furthermore, when it appeared to suit his purpose, he argued strenuously on the first appeal to the Seventh Circuit that the instruction provided for and that the jury *had* awarded profits, not damages.[6] The Seventh Circuit agreed and so held (573 F.2d at 985-986, App. 16a-17a). What petitioner claims is that the Seventh Circuit was wrong because it agreed with him that he *had* received respondent's profits.

Obviously, petitioner's claim that he never received profits is a complete reversal of his prior position, a reversal he obviously feels is now to his advantage.[8] He first switched positions after the first appeal when he managed to convince the trial court on remand that he had been awarded "damages", not "profits", and that the Seventh Circuit's clear holding to the contrary was a "mistake" and was "bizarre".[9] The Seventh Circuit was clearly correct when it held on the second appeal that it was petitioner and the trial court who had made the "mistake" of failing to follow the mandate.

Petitioner comes before this Court attempting to rewrite the facts and law of this case in order to suit his perceived needs

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[7] During the first appeal, petitioner also argued that the word "damages," as used in the instruction, was merely a label that did not alter his theory of profit recovery (SA248). Only now, according to him, does this label *ipso facto* become a *sine qua non* to his theory of recovery. Indeed, the predecessors to the instruction in question, which petitioner now claims were proper profit instructions improperly rejected by the trial court, also used the word. (SA 61, 99)

[8] Respondent unsuccessfully argued to the Seventh Circuit on the first appeal that this was a damage instruction. However, respondent recognizes that the Seventh Circuit's holding to the contrary is the law of this case and binding on the parties.

[9] As stated above, petitioner gave the Seventh Circuit no opportunity to correct its "mistake," disdaining a petition for rehearing because "... *we felt that for a variety of reasons, we weren't going to get anywhere...*" (SA 837, emphasis supplied).

of the moment. Clearly, there is no merit to his contention that he has been denied a jury trial. Rather, he has received all that the Constitution allows. The only threat to Constitutional rights which could exist with respect to this case is petitioner's attempt to secure an illegal additur to the jury verdict. The petition should be denied.

B.

The Seventh Circuit Correctly Held That Petitioner's Rights to Post-Judgment Recovery Are Only Those Which Flow From The Patents

In another, but equally futile, attempt to conjure a ground for this Court's review, petitioner argues that the Seventh Circuit "unfairly" denied him an accounting for the period after January 20, 1977, the date when the trial court entered judgment on the jury verdict and the date when he is deemed the owner of the patents.[10] Here too, however, petitioner's argument must fall because the Seventh Circuit was wholly correct in fact and law.

What the Seventh Circuit did was to put petitioner in the same position he would have been in had the trial court granted his request for return of the patents when it entered judgment. Had the trial court done so, petitioner would have had to sue infringers in order to obtain any further recovery, *exactly* as he does now. How can petitioner seriously claim that he has been treated "unfairly" by the Court of Appeals?

In fact, petitioner's arguments concerning the "adequacy" of this post-judgment remedy are not with the Seventh Circuit, but with Congress. Thus, he argues that the infringement

[10] As noted above, the Seventh Circuit unanimously held that petitioner is to be the owner of the patents as of that date and a majority held that he must rely on these patents for any monetary recovery thereafter.

remedy is "inadequate" because he can only recover his damages, not respondent's profits. However, as he himself points out at page 14 of his petition, it was the decision of Congress to provide this remedy to patent holders like petitioner. For the Court of Appeals to have unilaterally altered this remedy to suit petitioner, as he apparently requests, would, to say the least, have rendered the Patent laws a nullity.

Far from being "inadequate", as petitioner asserts, the infringement action has been expressly created by Congress, and is, therefore, necessarily a sufficient remedy for patent owners such as petitioner. It is axiomatic that the availability of an adequate remedy at law bars the equitable relief sought by petitioner. *See, Beacon Theatres* v. *Westover,* 359 U.S. 500, 506-07 (1959); *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49, 57 (1975); *Adamszewski* v. *Local Lodge 1487,* 496 F.2d 777, 786 (7th Cir. 1974), *cert. denied,* 419 U.S. 997 (1974); *Fox Valley Harvestore, Inc.* v. *A. O. Smith Harvestore Prod., Inc.,* 545 F.2d 1096 (7th Cir. 1976). Clearly, the very existence and adequacy of the remedy for infringement, as established by Congress, forecloses petitioner's request for equitable relief for the period after the effective date of the return of his patents.

Perhaps one reason why petitioner is reluctant to rely on the patents for further recovery is because there would finally be the hearing on the question of validity which respondent has sought for over ten years. Evidently, petitioner prefers to continue to avoid the question of validity, despite his repeated assertions that the patents are valid. However, in this instance, too, it is the Patent laws, not any supposed error by the Seventh Circuit, which give respondent the right to challenge validity upon the return of the patents to petitioner. Those laws make it abundantly clear that petitioner may not recover for the use of his "invention" after he owns the patents unless the patents are valid. *Lear, Inc.* v. *Adkins,* 395 U.S. 653 (1969).

It is obvious that petitioner has not been treated unfairly in any way. The courts below have given him every right to which

he is entitled in fact and under the law. For these reasons as well, the petition should be denied.

C.

The Seventh Circuit's Holding Does Not Conflict With Any Other Legal Precedent Or With The Election Of Remedies Doctrine

In a last desperate attempt to avoid the necessary conclusion that he has received all to which he is entitled, petitioner contrives an argument that the Seventh Circuit's opinion on the second appeal is inconsistent with its prior opinion and with opinions of this Court and other courts of appeals. But, like his other arguments, this contention ignores the facts and is devoid of legal merit.

In the first place, the two opinions of the Seventh Circuit are not inconsistent. As respondent has shown, that court, on the first appeal, held that petitioner was not entitled to an increase in the amount of profits which he had been awarded by the jury or to any post-judgment profits. The first opinion also held that petitioner was not barred by the election of remedies doctrine from obtaining the return of the patents, and it remanded the case to the trial court solely for a determination whether petitioner could regain the patents so that he might have their benefits in the post-judgment period.

However, as discussed above, the trial court disregarded the Seventh Circuit's mandate and ordered an accounting of respondent's pre- and post-judgment profits. The *only* issue involved in the second appeal was whether the trial court had followed the mandate or law of the case. The Seventh Circuit correctly held it had not.

Petitioner asserts that, because the Seventh Circuit's second opinion occasionally used the term "damages" to describe the $1,000,000 award, it improperly applied a so-called "anti-

quated" election of remedies doctrine to hold that he elected "damages". Thus, he asserts, this Court should apply the so-called "modern" doctrine and award him profits. But this argument is patently without merit. The Seventh Circuit neither held that petitioner elected a "damage" remedy, nor did it apply an "antiquated" doctrine.

In the first place, if the Seventh Circuit had really held that petitioner "elected" a damage remedy as he now claims, it would not and could not have awarded him the *equitable* relief of return of the patents. *Paoli* v. *Zipout, Inc.*, 21 Ill.App.2d 53, 157 N.E.2d 79 (1959).

Moreover, even under petitioner's own description of the "modern" and allegedly proper election of remedies doctrine (*Alton* v. *Hawes,* 63 Ill.App.3d 659, 380 N.E.2d 7 (1978)), "damages" and "profits" for the same period of time would be a forbidden double recovery.[11] As a leading commentator has noted, under the modern doctrine:

> "...[*a plaintiff*] *may not, obviously enough, recover full damages for fraud and also recover full restitution,* since this would in effect be a double recovery, or at least more than one full recovery." D. Dobbs, *Handbook on the Law of Remedies,* § 9.4, at p. 620 (1973) (Emphasis added).

And even if it were possible to credit petitioner's current claim that the jury awarded damages, he insisted on and

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[11] *Alton* v. *Hawes,* 63 Ill. App.3d 659, 380 N.E.2d 7 (1978), cited by petitioner at page 24, is not applicable. In *Alton,* the court held that a plaintiff who had previously obtained a money judgment did not elect that remedy under the "modern" election of remedies doctrine where "...plaintiff's judgment for damages...has not been *collectible* and, in fact, *appears uncollectible*..." 63 Ill.App. 3d at 663. Unlike the case at bar, those facts would avoid any question of double recovery. Petitioner's offer to credit respondent with the $1,000,000 recovery would hardly avoid a forbidden double recovery. There would still be an unconstitutional additur in violation of respondent's Seventh Amendment right to a trial by jury.

received payment of the $1,000,000 verdict. Under these circumstances:

> "...there may be a very good reason to preclude the plaintiff from further claims *once he has proceeded to a final judgment or a satisfaction of it,* even if there is not always such a good reason to preclude him when he has only initiated a law suit.
>
> Where the plaintiff actually recovers the remedy he seeks and enforces it, *as where he recovers a judgment for damages and actually collects on it,* there is no problem in holding that *the plaintiff is barred from any further remedy."*

D. Dobbs, *Handbook on the Law of Remedies,* § 1.5, at p. 19 (1973) (Emphasis added).

Clearly, then, it cannot be said that petitioner has been restricted to "legal" relief. The only "election" the Seventh Circuit found he made was the choice to submit the measure of monetary relief to the jury. He received that monetary relief from the jury, although he obviously wanted more. He also received the return of his patents, as he requested, and the opportunity to pursue his rights thereunder, should he so desire. As respondent has shown, a judicial increase in the award would itself be unconstitutional and, as the Seventh Circuit stated, "*completely unfair* to Sears." Under any interpretation of the law, plaintiff has received all to which he is entitled.

Finally, there is no merit to petitioner's contention that the Seventh Circuit's second opinion conflicts with decisions of this and other courts dealing with the right to a jury trial on "equitable" claims. At the risk of repetition, but in the hope of clarity, petitioner demanded and received a jury trial on all of his monetary claims, legal and equitable. These claims were submitted to the jury, which returned a $1,000,000 verdict in his favor. Evidently, the amount did not meet his desires and expectations. But the definition of a jury trial guaranteed by the

Constitution is not one which has a guaranteed result, compelling a court to add to the jury's verdict.

Surely, none of the cases cited by petitioner condone such an unconstitutional additur, nor do those cases support his claim that the holding of the Seventh Circuit is in conflict with other decisions. In fact, in each of the decisions of this Court which petitioner cites, *Ross* v. *Bernhard,* 396 U.S. 531 (1970), *Simler* v. *Conner,* 372 U.S. 221 (1963), *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962) and *Beacon Theaters* v. *Westover,* 359 U.S. 500 (1959), the plaintiff's jury demand had been improperly stricken, and this Court held that plaintiff was entitled to submit factual disputes to a jury. No such denial of a right to a jury trial occurred here. Rather, petitioner's jury demand was honored, and all contested issues were determined by the jury, as he requested.

No more apposite are the cases from other Circuits cited by petitioner, *Kennedy* v. *Lasko Co., Inc.,* 414 F.2d 1249 (3rd Cir. 1969), *Bruce* v. *Bohanon,* 436 F.2d 733 (10th Cir. 1971) and *Nunez* v. *The Superior Oil Co.,* 572 F.2d 1119 (5th Cir. 1978). In each of those cases as well, plaintiff had actually been denied a trial by jury, not just a verdict in the amount he may have desired. None of those cases involved a plaintiff who asked for and received a jury trial, had his claim for monetary relief submitted to the jury pursuant to his own instruction, received a monetary award and obtained rescission of an agreement and return of the *res.* There simply is no "conflict" at all between the Seventh Circuit and any other law.

CONCLUSION

Petitioner has not been denied a trial by jury or any other right to which he was entitled. Rather, he has received a full and fair hearing of his claims, including appellate review by two panels and the full bench of the Seventh Circuit. The only threat to Constitutional rights which might exist in this case would be in the event of an additur which would deny Respondent's Seventh amendment rights. Clearly no ground exists for review of the Seventh Circuit's decision. For each and all of the foregoing reasons, Respondent, Sears, Roebuck and Co., respectfully prays that the Petition for Certiorari be denied.

Respectfully submitted,

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